Minor Liability and Liability for Minors

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I. Child as the Plaintiff: Contributory Negligence and a Minor's Standard of Care

Tort obligations arise by operation of law, rather than by agreement between parties. *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991).

The tort of negligence has three elements: "(1) a duty on the part of the defendant in relation to the plaintiff; (2) a failure by the defendant to conform its conduct to the requisite standard of care; and (3) an injury to the plaintiff proximately caused by the failure." *Harris v. Traini*, 759 N.E.2d 215, 222 (Ind. Ct. App. 2001). Whether a breach of duty occurs "is a factual question which requires an evaluation of [the defendant's] conduct with respect to the requisite standard of care." *Id*. at 223 (quoting *Kinsey v. Bray*, 596 N.E.2d 938, 944 (Ind. Ct. App. 1992), *trans. denied*). However, if a plaintiff is contributorily negligent, he may be barred from recovering damages from a defendant.

Since 1985, Indiana has been a comparative fault state, meaning that a plaintiff can still recover from a defendant despite being contributorily negligent so long as the plaintiff's negligence did not cause him to be greater than fifty percent at fault. *Penn Harris Madison School Corp. v. Howard*, 861 N.E.2d 1190, 1193 (Ind. 2007) (citing I.C. 34-4-33-4). However, if the defendant is a government entity, any contributorily negligence will bar the plaintiff from recovering. *Id.* (citing I.C. 34-4-33-8, which exempts governmental entities from a comparative fault analysis).

Indiana has adopted a three-tiered analysis that is applied to determine whether a child can be found to have acted negligently. *Creasy v. Rusk*, 730 N.E.2d 659 (Ind. 2000). "[C]hildren under the age of 7 years are conclusively presumed to be incapable of being contributorily negligent, from 7 to 14 a rebuttable presumption exists" against liability, but upon proof "they may be guilty thereof, and over 14, absent special circumstances, they are chargeable with exercising the standard of care of an adult." *Bailey v. Martz*, 488 N.E.2d 716, 721 (Ind. Ct. App. 1986). *See also Clayton v. Morgan County Sheriff's Department*, 95 N.E.3d 189 (Ind. Ct. App. 2018) (holding that a child under the age of seven years old cannot be found contributorily negligent).

This section examines the application of the standards for seven to 14-year-olds and for minors over the age of 14.

A. Seven to 14-Year-Olds

The Indiana Supreme Court has held that "[t]he standard of care for a child between the ages of seven and 14 is well-established." *Clay City Consolidated School Corp. v. Timberman*, 918 N.E.2d 292, 295 (Ind. 2009). That standard, a flexible rule set forth by the Restatement (Second) of Torts § 283A (1965) is "that of a reasonable person of like age, knowledge, judgment, and experience." *Clay City* at 295; *see also Creasy v. Rusk*, 730 N.E.2d 659, 662 (Ind. 2000); *Smith v. Diamond*, 421 N.E.2d 1172, 1179 (Ind. Ct. App. 1981).

The rationale behind such a law is supportive child psychology that recognizes that children "have the capacity to inhibit impulses and foresee the consequences of their actions, but that children vary widely in this capacity." *Clay City* at 295 (citing *What a Difference a Day Makes: Age Presumptions, Child Psychology, and the Standard of Care Required of Children*, 24 Pac. L.J. 1323, 1332 (1993)). Such rationale is captured by Indiana Pattern Jury Instruction No. 5.25, which states in pertinent part, "[a] child seven (7) through the age of fourteen (14) must exercise the same care that a reasonably careful child of the same age, knowledge, judgment, and experience would exercise in the same situation."

Clay City highlights this rule's practical effect at trial. There, the parents of a 13-year old who died during basketball practice for his school's team brought a wrongful death action against the school corporation. Two days prior to his death, the decedent had "blacked out" during strenuous activity at practice and thereafter, his mother informed the coach that the decedent was not to participate in running or like activities until cleared by a doctor. But when the decedent returned to practice, the coach required all players to perform a running drill and shortly after he began participating, the decedent collapsed and died.

At trial, the school argued that the decedent's own negligence contributed to his death. Nevertheless, the jury returned a verdict and damages in favor of the decedent's parents. The school appealed, and the Court of Appeals reversed and remanded the matter for a new trial after finding that the trial court committed reversible error when, at the parents' request, it instructed the jury as follows:

> In deciding whether Kodi Pipes was contributorily negligent, you should know that Indiana law recognizes a rebuttable presumption that children from the age of 7 to 14 years of age are rebuttably presumed to be incapable of contributory negligence.

> A "rebuttable presumption" means that if you find Clay School Corporation has not presented evidence to show that Kodi Pipes' own negligence contributed to his death, you should presume that Kodi Pipes was not contributorily negligent. If, on the other hand, you find that Clay School Corporation has presented evidence to show that Kodi Pipes was contributorily negligent then you should weight that evidence against both the presumption that children between 7 and 14 are rebuttably presumed to be incapable of contributory negligence, through their own negligence, to their injuries and any evidence that Kodi Pipes' negligence did not contribute to his death in deciding the issue of whether Kodi Pipes was contributorily negligent.

Clay City at 294.

"The Court of Appeals reasoned that Indiana law does not conclusively contain a presumption either in favor or against seven to fourteen-year-olds with respect to whether they can be found liable for their negligent acts." *Id*. (internal citation omitted).

On transfer, though, the parents' argument centered on the premise that Indiana law accords with *dicta* from a century-old criminal case, *Bottorff v. S. Const. Co.*, 110 N.E. 977 (1916), wherein the Indiana Supreme Court held that a child between the ages of seven and 14 is "presumed to be incapable of committing crimes, but the presumption may be rebutted by proof that the infant possessed sufficient discretion to be aware of the nature of the act . . . It seems that the greater weight of authority is to the effect that the same rule applies in negligence cases." *Id.* at 978.

Adopting that argument, and the *Bottorff dicta*, the Court in *Clay City* overturned the Court of Appeals' reversal, holding that, in addition to paralleling the "unquestioned obligation that the alleged tortfeasor bears of proving contributory negligence," Indiana law recognizes a rebuttable presumption that children between the ages of seven and 14 are incapable of contributory negligence. *Clay City* at 297-98. The Court then proceeded to find that, in light of Rule 301 of the Indiana Rules of Evidence, the trial court's instruction reflected the presumption running in favor of the parents and that if the school could rebut the presumption with evidence showing the decedent's capacity – by offering proof that based on his age, mental capacity, intelligence, and experience, that decedent was accountable for his actions – the question of whether he was contributorily negligent would then be one of fact left for the jury to decide; thus, the trial court did not err in giving that instruction.[1] *Id*. at 298.

[1] No comparative fault analysis was necessary because the petitioner-defendant, Clay City School Corporation, is a governmental entity.

B. Minors Over the Age of 14

Minors over the age of 14 are held liable for their contributory negligence, absent special circumstances.[2] *Penn Harris Madison* at 1194. Specifically, they are chargeable with exercising the standard care of an adult. *Id.* (citing *Cedars v. Waldon*, 706 N.E.2d 219, 224 (Ind. Ct. App. 1999).

The rationale behind this elevated standard of care is threefold:

> First, it provides an incentive to those responsible for children and interested in their estates to prevent harm and restrain those who are potentially dangerous. Second, it avoids the administrative problems involved in courts and juries attempting to identify and assess what a "reasonable person of like age, intelligence, and experience under the circumstances" would do. And third, it imposes on individuals over 14 years of age the cost of the damage they cause if they engage in dangerous activities. *Creasy*, 730 N.E.2d at 664.

Penn Harris Madison at 1195.

Penn Harris Madison involved a 17-year old high school student who helped put on a stage production of "Peter Pan" at a local elementary school. The student, who had experience rock climbing and repelling, "devised and constructed a pulley mechanism designed to allow the Peter Pan character to 'fly' above the audience." *Id*. at 1192. On the night of the dress rehearsal, the student who created the pulley connected himself to the apparatus, which failed, causing him to fall to the gymnasium floor and suffer several injuries. *Id*.

The student's mother, individually and as his next friend, sued Penn Harris Madison School Corporation (PHM), alleging its negligence caused her son's injuries. At trial, the plaintiffs proposed, and the court adopted and gave, a jury instruction that told the jury it must determine whether the student had exercised the "reasonable care a person of like age, intelligence, and experience would ordinarily exercise under like or similar circumstances." *Id.* at 1194. The jury returned a verdict for the plaintiffs in the amount of $200,000.

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[2] The definition of "special circumstances" is not set forth by this line of cases. Presumably, issues like mental and physical handicaps would be special circumstances that would relieve a 15- through 17-year-old's duty to act like an adult. Conversely, other circumstances in a minor's life can reinforce the applicable standard of care. *See e.g.*, *Harradon v. Schlamadinger*, 913 N.E.2d 297 (Ind. Ct. App. 2009) (where the court found that two minors were "especially" charged with exercising the standard of care of adults "because [they] had engaged in the adult activities of conceiving [a] child . . . and had exclusively cared for the child from its birth until its death.").

However, the Indiana Supreme Court found that it was error for the trial court to give such an instruction because the student "was 17 years old at the time he was injured" and "[a]s such, the law charged him with exercising the standard of care of an adult, not that of 'a person of like age.'" *Id*. at 1195. But despite that error, the Court did not overturn the verdict on those grounds. Rather, it found that because PHM had detailed the student to be "an exceptional young man" throughout the trial, and because the student was "described by virtually every witness as being intelligent, mature, and responsible," the error was harmless as the reasonable care exercised by a person of like age, intelligence, and experience as the student (based on those descriptions) would be that of an adult.[3]

II. Child as the Defendant: Parental Liability for Intentional Torts

Generally, "common law does not hold a parent liable for the tortious acts of [a] minor child." *Moore v. Waitt*, 298 N.E.2d 456, 461 (Ind. 1973). Traditionally, though, at common law, there were four exceptions to that general rule:

> (1)[W]here the parent entrusts the child with an instrumentality which, because of the child's lack of age, judgment, or experience, may become a source of danger to others; (2) where the child committing the tort is acting as the servant or agents of the parents; (3) where the parent consents, directs, or sanctions the wrongdoing; and (4) where the parent fails to exercise control over the minor child although the parent knows or with due care should know that injury to another is possible.

Wells v. Hickman 657 N.E.2d 172, 176 (Ind. Ct. App. 1995) (quoting *K.C. v. A.P.*, 577 So.2d 669, 671 (Fla. App. 1991)).

Indiana statute creates an additional, limited exception to the general rule. Specifically, I.C. 34-4-31-1 permits a defendant-child's parents to be held liable for intentional torts and the negligent parental supervision exception allows parents to themselves be found negligent based on their child's behavior.

The exception created by I.C. 34-31-4-1 and the common law exception of negligent parental supervision are discussed *infra*.

A. Indiana Code 34-31-4-1

[3] Chief Justice Shepard dissented arguing that because governmental entities are exempt from the comparative fault analysis, and a mere 1% of fault would be sufficient to bar the plaintiff from recovering, he would not have found the error to be harmless and would have reversed and remanded.

Indiana Code 34-31-4-1 states that except in cases where a child's intentional torts have resulted from their participation in a criminal organization and the parents have promoted or encouraged such participation, a parent is liable for up to "$5,000 in actual damages arising from harm to a person or damage to property knowingly, intentionally, or recklessly caused by the parent's child if: (1) the parent has custody of the child; and (2) the child is living with the parent."[4] Functionally, this statute makes "a parent strictly liable for the knowing, intentional, or reckless tortious acts of the parent's minor-child." *Wells* at 176.

Each of the elements beyond the tort itself – that the child be in the parent's custody and that the child be living with the parent – are elements that must be proven by the plaintiff. *See Johnson v. Toth*, 516 N.E.2d 85 (Ind. Ct. App. 1987) (reversing a trial court's ruling in favor of the plaintiffs where the plaintiffs admitted on appeal that they had not demonstrated that the offending child was in his parents' custody and asserted, rather, that the custody and living elements were affirmative defenses available to the defendants).[5]

As the plain language of the statute suggests, when parents are found liable for damages pursuant to this statute, punitive damages may not be assessed against the parents. *See Hyman v. Davies*, 453 N.E.2d 336 (Ind. Ct. App. 1983) (finding that, where a minor-child had escaped house arrest from his parents' home and proceeded to break into a neighbor's car, steal items from the car, and then drive the car to Michigan to buy drugs, treble damages recoverable pursuant to I.C. 34-4-30-1 could only be entered against the minor-child and not against his parents).

As for the *mens rea* requirement underlying the child's tort, the following examples may be helpful for explaining the differences between each possible level of culpability.

1. <u>Intentionally</u>

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[4] If the tort is the result of such participation in a criminal organization, there is no limit to the parent's liability. However, the plaintiff must prove two additional elements, beyond the child being a member of a criminal organization: (1) that the defendant-parent actively encouraged or knowingly benefitted from the child's membership in the organization, and (2) that the parent failed to use reasonable efforts to prevent the child's involvement in the organization. *See* I.C. 34-31-4-2.

[5] The *Johnson* court did not address the meaning of "custody." In fact, it does not appear that any court has addressed the definition of "custody" for purposes of interpreting I.C. 34-31-4-1, so a potential area for litigation might be whether custody means legal custody of the kind ordered by a court in a family law matter or actual control over the child.

"A person engages in conduct 'intentionally' if, when he engages in the conduct, it is his objective conscious to do so." I.C. 35-41-2-2.[6] But how might one prove that an actor engaged in intentional conduct?

It is, unquestionably, difficult to convince a layperson that you can prove what a person was thinking, or what was going through a person's mind, when he decided to act. Without a using a concrete example to demonstrate the differences between definitions and how circumstances surrounding an event can shed light on the actor's mind, a plaintiff will likely fail to prove his case.

Imagine a child holding a baseball in his front yard. The child faces his mother's dining room window and focuses his eyes on it. Then he begins his pitching motion, squaring his shoulders to the window, and heaves a fastball directly into the glass, shattering it.

From the boy's actions – facing the window and throwing a ball directly toward it – and the other surrounding circumstances (that the window is glass, a material that is easily broken, and that no person was standing between the boy and the window to catch the ball) we can infer, and prove, that the boy intentionally broke the window.

2. Knowingly

"A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so. *Id*.

Now imagine the boy in his front yard playing catch with his little sister who tries her best but simply cannot catch a baseball. In fact, she is afraid of baseballs and regularly dodges out of the way of the ball when her brother throws to her. The boy lines his sister up in front of the window and chucks the ball her way. Of course, the sister jumps out of the way and the ball hits the window, shattering it.

From the present circumstances – the sister who is afraid of the ball standing directly in front of the window and the window being made of glass, which is easily broken – we can demonstrate that the boy was aware, or should have been aware, of a high probability that the glass would be broken.

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[6] Though this is a criminal statute defining "intentionally," "knowingly," and "recklessly," courts and civil statutes alike have not hesitated to adopt these definitions and apply them accordingly to civil matters. *See e.g.*, *Board of County Com'rs of St. Joseph County v. Tinkham*, 491 N.E. 578, 582 (Ind. Ct. app. 1986) (citing I.C. 35-41-2-2 as a source defining "intent" and applying such definition in a civil action); I.C. 22-4-11.5-6 (adopting the definitions set forth in I.C. 35-41-2-2 for use in unemployment compensation matters).

3. Recklessly

Lastly, "[a] person engages in conduct "recklessly" if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.

So, finally, imagine the boy holding the baseball and heaving it down his empty street, but the ball bouncing into a nearby intersection and hitting and breaking the window of a car passing by. When the boy threw the ball, he might not have been aware of any high probability that throwing the ball down the empty street was going to break a window. But throwing a rock-like object down the road, not knowing where it might end up and how the conditions of the roadway might change, could be sufficient to prove that the boy's conduct was reckless because his actions disregarded that harm might result and the disregard substantially deviated from acceptable standards of conduct (throwing the ball down the road versus throwing it to a person in his own yard).

B. Negligent Parental Supervision

Beyond a minor himself being found liable, parents of the minor can also be found to have been negligent in some situations where the minor causes injury. Specifically, a parent can be found liable for damages resulting from the tort of negligent parental supervision.

Indiana's appellate courts have explained the tort of negligent parental supervision as follows:

> The [negligent supervision] exception provides that a parent has a duty to exercise control over her minor child when the parent knows or should know that injury to another is possible. To be liable the parent must know that her child had a habit of engaging in the particular act of course of conduct which led to the plaintiff's injury.
>
> Imposition of a duty is limited to those circumstances where a reasonably foreseeable victim is injured by a reasonably foreseeable harm . . . We conclude that a duty attaches when there has been a failure to control and the parent knows or should have known that injury to another was reasonably foreseeable. Specially, the parent must know or should have known that the child had a habit of engaging in the particular act or course of conduct which led to the plaintiff's injury.

Shepard by Shepard v. Porter, 679 N.E.2d 1383, 1389 (Ind. Ct. App. 1997) (quoting *Wells* at 177-78 (internal citations omitted).

It is important to note, though, as the Indiana Supreme Court did in *Wells*, that this exception does not impose vicarious liability on parents due to their familial relationship with the offending minor-child. *See Wells* at 177. Rather, the parent's negligence "is a separate act of negligence independent of," but requiring "the child's wrongful act." *Id*.

The *Shepard* court found that the negligent parental supervision exception is not expansive enough, though, to impose a duty based solely upon a child's general disposition and a wrongful act being committed. *Id*. at 1389. "Rather, liability attaches only when the parent knows or should know of the child's propensity to engage 'in the *particular* act or course of conduct which led to the plaintiff's injury.'" *Id*. (quoting *Wells*) (emphasis added by the Court). In other words, foreseeability is the critical issue. *Wells* at 178.

In *Shepard*, the Court, in applying the narrow rule, found that where the parents of four boys merely knew that their children generally had "mischievous, reckless, heedless, or vicious and malicious dispositions, and reputations for possession such dispositions," they could not be found liable for their children setting another boy on fire because "the victim and cause of injury were not sufficiently foreseeable to impose a duty upon the parents." *Id.* 1389-90. Presumably, the parents would have had to know that their children had a propensity for starting fires.

In the Florida case that set forth the standard adopted by the *Shepard* court, one minor sued another minor and the defendant's parents for the defendant having sexually assaulted the plaintiff. *See K.C. v. A.P.* There, the psychologist employed by the plaintiff as an expert witness testified that neither set of parents could have anticipated the specific abusive acts that occurred. *Id*. at 670. The defendant's court-appointed psychologist added that "it is common for children who engage in sexual encounters to keep such acts a secret." *Id.* And finally, a third psychologist testified specifically that the defendant's parents could not have predicted that their minor-child would sexually abuse another child unless they knew that their child was sexually abused as a young boy. *Id*. The court ruled that, in light of all of this testimony, the trial court had erred in failing to enter a directed verdict in favor of the defendant's parents on the negligent supervision count. *Id*.

Likewise, in *Wells*, the Indiana Supreme Court found that even where a mother was aware of her minor-child's troubling behavior – including being aware of the minor-child's "cruelty to animals and his comments about committing suicide," as well as him "need[ing] professional help"

– it could not conclude "that it was reasonably foreseeable he would kill a neighborhood friend." *Wells* at 178.[7]

[7] In *dicta*. after deciding that the mother had no duty to exercise control over her son because the harm was not reasonably foreseeable, the Court noted further that, as a matter of law, she did not have a duty to exercise control because the victim was also not foreseeable. *Wells* at 179. Further, the Court ruled that the grandparents of the minor-child did not have a duty to control their grandson and, accordingly, balked at deciding whether or not grandparents, as a class, are subject to liability for failure to control their grandchildren. *Id.* at 179, n. 4. The question remains unanswered by Indiana courts.